KELANA MEGAH DEVELOPMENT SDN BHD v. KERAJAAN NEGERI JOHOR & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
LIM YEE LAN JCA
VARGHESE GEORGE JCA
IDRUS HARUN JCA
[CIVIL APPEALS NO: J-01-(IM)(NCVC)-512-12-2014 &
J-02(IM)(NCVC)-2187-12-2014]
21 JUNE 2016

CIVIL PROCEDURE: *Mode of commencement of proceedings – Objection and dissatisfaction over compensation awarded for land acquisition – Registered proprietor commenced action by way of writ and statement of claim – Whether proper mode of challenging or objecting against decision to gazette land acquisition – Rules of Court 2012, O. 53*

LAND LAW: *Acquisition – Compensation – Land compulsorily acquired by State Authority – Registered proprietor of lands not satisfied with compensation for acquisition lands – Registered proprietor commenced action by way of writ to challenge validity of acquisition – Whether proper mode of challenging or objecting against decision to gazette land acquisition – Land Acquisition Act 1960, s. 3(1)*

The appellant was the previous proprietor of seven plots of agricultural estate land ('the lands') held under freehold titles. The State Authority compulsorily acquired the lands for a project ('RAPID project') undertaken by the second respondent, pursuant to s. 3(1) of the Land Acquisition Act 1960 ('the Act'). The appellant was awarded with a total compensation of RM114,964,890 for the acquisition of the lands. Dissatisfied with the amount awarded, the appellant objected against the award by filing an action at the High Court against the respondents, resulting in pending land references proceedings ('land references'). By way of writ of summons and statement of claim, the appellant commenced the present action against the respondents, seeking, *inter alia*, (i) a declaration that the acquisition exercise was illegal and of no effect; (ii) an order compelling the State Authority to revoke the acquisition and to return the issue documents of title to the appellant under freehold titles; and (iii) an order that the second respondent delivers vacant possession of the lands. The respondents applied to strike out the appellant's action. The High Court decided in favour of the respondents and in striking out the appellant's writ of summons and statement of claim, held that, *inter alia*, (i) any challenge or objection against the decision to gazette the land acquisition must be done by way of judicial review. The appellant failed to commence judicial review proceedings within the prescribed time limit and was therefore estopped from challenging the decision of the State Authority; (ii) the issues that were raised by the appellant were not issues to be tried; and (iii) the appellant's action to reclaim

the title or interest in the lands that were legally-acquired by the State Authority was contrary to s. 29(1)(b) of the Government Proceedings Act 1956 ('the GPA'). Hence, the present appeal.

Held (dismissing appeal; affirming order of High Court)
Per Idrus Harun JCA delivering the judgment of the court:

(1) The declaration sought by the appellant that the acquisition exercise was illegal and of no effect, was an affront against s. 29(1) of the GPA. Even if a declaration in appropriate terms is to be considered in this case, the lands would continue to remain as State lands. The only remedy available to the appellant would be that of monetary compensation reflective of the appropriate market value of the lands. Therefore, the forum for claiming such compensation is the land references. Any claim for monetary compensation for the lands in this suit would duplicate the claim within the land references. Apart from being an abuse of court's process and scandalous, a prayer for declaration whether as presently sought or modified was frivolous and vexatious due to the appellant's pending land references. (para 28)

(2) The appellant challenged the exercise of the first respondent's jurisdiction, functions, rights and powers in relation to the acquisition and contended that the acquisition was a nullity. The appellant's complaints were based on the alleged infringement of its rights in public law and not private law. However, the appropriate mode for pursuing complaints based on the alleged infringement of public rights is judicial review under O. 53 of the Rules of Court 2012 ('ROC'). Order 53 r. 3(6) clearly prescribed a requirement to act promptly and in any event, within three months from the date when the ground of complaint first arose or when the decision was first communicated to the appellant. The appellant was, without a doubt, out of time to do so and had indeed already been out of time when it filed the present action. (para 29)

(3) While the land references were pending at the High Court, the appellant commenced the present suit against the respondents seeking, among others, a declaration that the acquisition of the lands was illegal on the ground of dishonesty, conspiracy and bad faith. The matter certainly has a substantial public law element which required the procedure under O. 53 of the ROC to be adopted. By commencing this action by way of a writ, the appellant had clearly abused the court's process. (para 44)

(4) The appellant sought to recover the lands which accounted to 45% of the RAPID project area. Substantial time, effort, costs and commitments had been expended and undertaken by the respondents in relation to the RAPID project. If the appellant succeeded, the RAPID project would necessarily fail. The resources committed to the RAPID project, effects on other landowners and anticipated benefits to society could not be

ignored. The attempts to cause the RAPID project to fail after a substantial lapse of time ought not to be entertained when the appellant only desires more compensation and had an opportunity to seek such increase in the compensation at the land references. (para 55)

Bahasa Malaysia *Headnotes*

Perayu adalah pemilik asal tujuh bidang tanah ('tanah tersebut') hak milik pegangan bebas. Pihak Berkuasa Negeri mengambil tanah tersebut melalui kuat kuasa undang-undang bagi satu projek ('projek RAPID') oleh responden kedua, di bawah s. 3(1) Akta Pengambilan Tanah 1960 ('Akta'). Perayu diawardkan RM114,964,890 bagi pengambilan tanah tersebut. Tidak berpuas hati dengan jumlah yang diawardkan, perayu membantah award dengan memfailkan satu tindakan di Mahkamah Tinggi terhadap responden-responden, menghasilkan rujukan tanah yang masih berjalan ('rujukan tanah'). Perayu memulakan tindakan ini terhadap responden-responden melalui writ saman dan pernyataan tuntutan, memohon, antara lain, (i) perisytiharan bahawa pengambilan tanah tidak sah dan tiada apa-apa kesan; (ii) satu perintah menggesa Pihak Berkuasa Negeri menarik balik pengambilan tersebut dan memulangkan semua dokumen hak milik keluaran kepada perayu di bawah pegangan kekal; dan (iii) satu perintah agar responden kedua menyerahkan milikan kosong tanah. Responden-responden memohon agar tindakan perayu dibatalkan. Mahkamah Tinggi menyebelahi responden-responden dan dalam membatalkan writ saman dan pernyataan tuntutan perayu, memutuskan bahawa, antara lain, (i) cabaran atau bantahan terhadap keputusan mewartakan pengambilan tanah mesti dibuat melalui semakan kehakiman. Perayu gagal memulakan prosiding semakan kehakiman dalam waktu yang ditetapkan dan dengan itu terhalang daripada mencabar keputusan Pihak Berkuasa Negeri; (ii) isu-isu yang dibangkitkan oleh perayu bukan isu-isu untuk dibicarakan; dan (iii) tindakan perayu menuntut semula hak milik atau kepentingan tanah yang diambil melalui kuat kuasa undang-undang oleh Pihak Berkuasa Negeri bertentangan dengan s. 29(1) Akta Prosiding Kerajaan 1956 ('APK'). Maka timbul rayuan ini.

Diputuskan (menolak rayuan; mengesahkan perintah Mahkamah Tinggi) Oleh Idrus Harun HMR menyampaikan penghakiman mahkamah:

(1) Deklarasi yang dipohon oleh perayu bahawa pengambilan tanah tersebut tidak sah dan tiada apa-apa kesan adalah satu pelanggaran s. 29(1) APK. Jika pun deklarasi dengan terma yang sesuai dipertimbangkan dalam kes ini, tanah tersebut kekal tanah negeri. Satu-satunya remedi yang ada buat perayu adalah pampasan kewangan yang mencerminkan nilai pasaran bersesuaian. Oleh itu, forum menuntut pampasan sedemikian adalah rujukan tanah. Apa-apa tuntutan pampasan kewangan bagi tanah dalam guaman ini menggandakan tuntutan dalam rujukan tanah. Selain satu salah guna proses mahkamah dan melampau, permohonan deklarasi, sama ada seperti yang dipohon atau diubah, adalah remeh dan menyusahkan kerana rujukan tanah perayu masih berjalan.

(2) Perayu mencabar penjalanan bidang kuasa, fungsi, hak dan kuasa responden pertama mengambil tanahnya dan menghujahkan bahawa langkah tersebut terbatal. Aduan-aduan perayu berasaskan dakwaan pelanggaran hak-haknya di bawah undang-undang awam dan bukan undang-undang persendirian. Walau bagaimanapun, kaedah yang sesuai untuk mengutarakan aduan-aduan berasaskan dakwaan pelanggaran hak-hak awam adalah semakan kehakiman di bawah A. 53 Kaedah-kaedah Mahkamah ('KKM'). Aturan 53 k. 3(6) memperuntukkan secara jelas keperluan bertindak segera dan dalam apa-apa jua keadaan, dalam tiga bulan dari tarikh aduan timbul atau apabila keputusan dimaklumkan kepada perayu. Tidak diragui bahawa perayu melebihi had masa dan sememangnya melebihi had masa semasa memfailkan tindakan ini.

(3) Sementara rujukan tanah masih berjalan di Mahkamah Tinggi, perayu memulakan guaman ini terhadap responden-responden memohon, antara lain, satu deklarasi bahawa pengambilan tanah tersebut tidak sah atas alasan ketidakjujuran, konspirasi dan niat jahat. Perkara ini mengandungi elemen besar undang-undang awam yang mengkehendaki pemakaian A. 53 KKM. Dengan memulakan tindakan ini melalui writ, perayu jelas menyalahgunakan proses mahkamah.

(4) Perayu berhajat mengambil semula tanahnya yang membentuk 45% kawasan projek RAPID. Banyak masa, usaha, kos dan komitmen dilabur oleh responden-responden bagi menjayakan projek RAPID ini. Jika perayu-perayu berjaya, projek RAPID pasti gagal. Sumber membiayai projek RAPID, kesan pada tuan-tuan tanah dan faedah-faedah yang dijangka dapat dinikmati oleh masyarakat tidak boleh diketepikan. Cubaan dan usaha menggagalkan projek RAPID selepas lama tamatnya masa tidak harus dilayan sedangkan perayu hanya mahukan pampasan lebih dan berpeluang mendapatnya dalam rujukan tanah.

Case(s) referred to:

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal [2011] 8 CLJ 766 FC ***(refd)***

Cheah Theam Kheng v. City Centre Sdn Bhd (In Liquidation) & Other Appeals [2012] 2 CLJ 16 CA ***(refd)***

Express Newspapers Plc v. News (UK) Ltd And Others [1990] 3 AII ER 376 ***(refd)***

Ganda Oil Industries Sdn Bhd v. The Kuala Lumpur Commodity Exchange & Anor [1988] 1 CLJ 126; [1988] 1 CLJ (Rep) 56 SC ***(refd)***

Gouriet v. Union of Post Office Workers [1978] AC 435 ***(refd)***

Honan Plantations Sdn Bhd v. Kerajaan Negeri Johor & Anor [1998] 3 CLJ 253 CA ***(refd)***

Leo Leslie Armstrong (Sebagai Presiden Dan Pemegang Jawatan The Young Men's Christian Association Of Kuala Lumpur) (Persatuan Pemuda Kristian Kuala Lumpur)

v. Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur (Yang Dahulunya Di Pegang Oleh Majlis Mesyuarat Kerajaan Negeri Selangor) [2015] 2 CLJ 10 CA ***(dist)***

Lim Cheng Chuan Realty Co Sdn Bhd v. Kerajaan Negeri Pulau Pinang [1999] 7 CLJ 499 HC ***(refd)***

Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd [2010] 5 CLJ 123 CA ***(refd)***

O'Reilly v. Mackman [1982] 3 AII ER 1124 ***(refd)***

Pemungut Hasil Tanah, Daerah Barat Daya (Balik Pulau) Pulau Pinang v. Kam Gin Paik [1983] 1 LNS 37 FC ***(refd)***

Pemungut Hasil Tanah, Daerah Barat Daya, Penang v. Kam Gin Paik [1986] 1 CLJ 283; [1986] CLJ (Rep) 33 PC ***(refd)***

R v. Panel on Takeovers and Merges; Ex p Datafin Plc [1987] 1 All ER 564 ***(refd)***

Ringgit Exoticka Sdn Bhd v. Pengarah Tanah & Galian Selangor & Ors [2013] 10 CLJ 663 HC ***(refd)***

Tenaga Nasional Bhd v. Irham Niaga Sdn Bhd & Anor [2011] 1 CLJ 491 CA ***(refd)***

Verschures Creameries, Limited v. Hull And Netherlands Steamship Company, Limited [1921] 2 KB 608 ***(refd)***

Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor [2013] 4 CLJ 193 FC ***(refd)***

Yahya Kassim v. Kerajaan Malaysia & Anor [1998] 1 CLJ 43 CA ***(refd)***

Yu Kuan Huat & Ors v. Pentadbir Tanah Wilayah Persekutuan Kuala Lumpur [2011] 1 LNS 1596 HC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, Schedule para. 1
Federal Constitution, arts. 8(1), 13(1)
Government Proceedings Act 1956, ss. 2, 29(1)(a), (b)
Land Acquisition Act 1960, ss. 3(1)(b), 23, 37, 38(1), 66
Land Acquisition Rules 1998, r. 3
Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c), O. 24, O. 53 rr. 1(1), 2(2), (3), 3(6)
Rules of the High Court 1980, O. 53

For the appellant - Tommy Thomas & Michael Yap; M/s Tommy Thomas
For the respondent - Khoo Guan Huat, Vijay Raj & Melissa Long; M/s Skrine

[Editor's note: For the High Court judgment, please see Kelana Megah Development Sdn Bhd lwn. Kerajaan Negeri Johor & Satu Lagi [2015] 1 LNS 985 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Idrus Harun JCA:

Preliminaries

[1] For convenience, we heard Civil Appeal No. J-01(IM)(NCVC)-512-12-2014 and Civil Appeal No. J-02-(IM)(NCVC)-2187-12-2014 together as they were related, the parties thereto were the same and they involved a common core of facts. We propose to give reasons for our decisions with respect to both appeals in this judgment. Before proceeding further, we may mention that in the court below, the appellant herein, namely Kelana Megah

Development Sdn Bhd commenced an action against both respondents by way of a writ of summons and statement of claim. Both respondents subsequently filed two separate applications pursuant to O. 18 r. 19(1)(a), (b) and (c) of the Rules of Court 2012 to strike out the appellant's writ of summons and statement of claim. The High Court allowed both applications. The appeals before this court have been brought by the appellant in the light of the High Court's decision in allowing the respondents' applications. We shall refer to the respondent in Appeal No. 512 as "the first respondent" while the respondent in Appeal No. 2187 as "the second respondent" and collectively we shall refer to them as "the respondents".

The Facts

[2] The appellant was previously the registered proprietor of seven plots of agricultural estate land under freehold titles located in the Mukim of Pengerang, District of Kota Tinggi, Johore with the total area of 1149.6487 hectares (the seven plots of land). The seven plots of land, at all material times, were planted with oil palm trees. Apparently, the State Authority, being of the opinion that it would be beneficial to the economic development of Malaysia or any part thereof or to the public generally, compulsorily acquired the seven plots of land for a project known as the 'refinery and petrochemical integrated development' (the RAPID project) to be undertaken by the second respondent. The seven plots of land account for approximately 45% of the 6239 acres of land required or acquired for the RAPID project. The acquisition was made pursuant to an application by the second respondent under s. 3(1)(b) of the Land Acquisition Act 1960 (the Act) and the requisite notifications were published in the Gazette.

[3] On 3 September 2012, the land enquiry in respect of the acquisition of the seven plots of land was conducted by the Land Administrator to determine its market value. It is irrefutable fact that the appellant participated in the said land enquiry. At the conclusion of the land enquiry, the appellant was awarded compensation of 93 sen per square foot amounting in total, to RM114,964,890 for the acquisition of the seven plots of land.

[4] Dissatisfied with the amount of compensation awarded by the Land Administrator for the seven plots of land, the appellant, pursuant to ss. 37 and 38(1) of the Act, filed an objection against the Land Administrator's award through the requisite Form N for each of the seven plots of land and thereby caused land reference proceedings to commence in the High Court at Johore Bahru in respect of the seven plots of land.

[5] There are seven land references made to the High Court *viz*:

(a) Land Reference Proceedings 15-62-03-2013 for Lot 74;

(b) Land Reference Proceedings 15-63-03-2013 for Lot 375;

(c) Land Reference Proceedings 15-64-03-2013 for Lot 520;

(d) Land Reference Proceedings 15-65-03-2013 for Lot 672;

(e) Land Reference Proceedings 15-66-03-2013 for Lot 836;

(f) Land Reference Proceedings 15-67-03-2013 for Lot 837; and

(g) Land Reference Proceedings 15-68-03-2013 for Lot 1104.

The proceedings under these land references are still pending in the High Court. It is noteworthy that the second respondent is the intervenor in these land references.

[6] The appellant, thereafter, commenced proceedings by way of an Originating Summons No. 24M-170-05-2013 on 2 May 2013 against the Land Administrator, District of Kota Tinggi in relation to three out of the seven plots of land which was subsequently amended to become the amended originating summons seeking declarations and orders for the purpose of fixing a later valuation date for the said three plots of land. The three lots in question are Lot 74, Lot 375 and Lot 1104. The said originating summons was struck out by the High Court on 8 September 2014.

[7] On 9 May 2014, the appellant filed the instant action against the respondents seeking, *inter alia*, the following reliefs:

(a) A declaration that the purported acquisition of the seven plots of land was illegal and of no effect;

(b) An order that the State Authority takes all necessary steps to revoke the acquisition of the seven plots of land, and to return the issue documents of title to the appellant under freehold titles;

(c) An order that the second respondent delivers vacant possession of the seven plots of land to the appellant; and

(d) An order that the second respondent pays damages for trespass of the seven plots of land and general damages for cutting the trees and destroying the oil palm estate.

Applications To Strike Out Writ And Statement Of Claim

[8] The respondents' applications to strike out the appellant's writ of summons and statement of claim in essence, were premised chiefly on the contention that a writ action was not the proper and correct mode to challenge the functions, rights and powers of the first respondent in connection with the acquisition of the seven plots of land. Any such challenge ought to have been by way of a judicial review proceedings. The prescribed period within which the appellant could do so by way of the correct mode of commencement was strict and the appellant was required to act in whatever circumstances within three months from the date when the grounds of application first arose or when the decision was first communicated to the appellant.

[9] Another principal reason relied on by the respondents in support of their applications concerns their assertion in regard to the inconsistent conduct of the appellant. The respondents, in this regard, contended that the appellant, while electing to seek remedies by way of land references in order to obtain an increase in the amount of compensation required to be paid for the seven plots of land, had proceeded on the basis that the acquisition of the seven plots of land was valid, whereas the appellant is seeking remedies in the present action to declare that the acquisition of the seven plots of land was illegal and of no effect. Therefore, the remedies sought by the appellant in the present action, the respondents argued, were inconsistent with the remedies sought in the land references and the originating summons dated 2 May 2013.

[10] Flowing from the above, in law, the appellant by this civil action was not entitled to pray for specific relief against the first respondent for the return of the seven plots of land to them, neither could the appellant seek relief against the second respondent as those relief, if granted, would involve a revocation or reversion of the first respondent's decision to acquire the seven plots of land. The remedies sought therefore, could not in law, be supported.

[11] The respondents, additionally, alleged that the appellant was attempting to improperly pressure the respondents into increasing the compensation payable to them for the acquisition of the seven plots of land by way of out of court settlement and that this was the main basis in filing the present action.

The High Court's Decision

[12] The decision of the learned judge can neatly be summarised as follows:

(a) Any challenge or objection against the decision to Gazette the land acquisition by the State Authority must be done by way of a judicial review as the decision to Gazette was the decision of the public authority;

(b) The appellant had failed to commence judicial review proceedings on the objection or challenge against the s. 8 Gazette notification within the prescribed time limit and was therefore estopped from challenging the decision of the State Authority;

(c) The appellant's action to revoke the land acquisition by way of writ action was an abuse of the court's process;

(d) All the issues raised by the appellant were not issues to be tried and all of the decisions made by the first respondent were administrative decisions made by it based on the authority given under the National Land Code and the Act. Any challenge to such decisions must be commenced by way of judicial review to determine whether the administrative action of the public authority was reasonable or not;

(e) The writ was filed one and a half years after the compensation monies were received by the appellant and the appellant was still proceeding with the land references. This was inconsistent with and contradictory to the appellant's acceptance of the relief applicable in the land references. The appellant's action was not in good faith and confusing, as such should be struck out on the ground of the appellant's "approbation and reprobation"; and

(f) The appellant's action to reclaim the title or interest in the seven plots of land that were legally acquired by the State Authority was contrary to s. 29(1)(b) of the Government Proceedings Act 1956 (Act 359).

The Appeals

[13] The grounds of appeal are set out in the memorandum of appeal. In gist, the gravamen of the appellant's complaints are that the learned judge had erred in allowing the striking out applications in circumstances where it was not plain and obvious to do so. There are in fact numerous sustainable causes of action pleaded in the statement of claim and numerous matters of disputes between the parties which could only be resolved by the calling of witnesses at a trial.

Decision

[14] We begin, before going more closely into the matter, by setting out in summary, the appellant's submission. Learned counsel, in his written submission, contended that in the course of exchanging affidavits in the land references, the appellant anonymously received five documents on 2 January 2014 through the post *viz*:

(a) Form 1 issued by the second respondent pursuant to r. 3 of the Land Acquisition Rules 1998, which originates the process for compulsory acquisition pursuant to s. 3(1)(b) of the Act;

(b) Form A under the Act;

(c) A draft agreement dated 24 February 2012 entered between the second respondent and the acquiring authority;

(d) An agenda for a meeting to be held on 7 March 2012 together with the list of attendees to discuss the agreement prior to the same being executed on 12 May 2012; and

(e) An agreement dated 12 May 2012 between the second respondent and the State Authority.

Upon receipt of these five documents and realising their impact, the appellant averred, the present suit was filed challenging the legality of the acquisition.

[15] Learned counsel then proceeded to set out the appellant's pleaded causes of action in the statement of claim which were:

(i) that the respondents acted *mala fides* in the acquisition of the seven plots of land (para. 42 of the statement of claim);

(ii) breach by the respondents of art. 13(1) of the Federal Constitution (para. 39 of the statement of claim);

(iii) breach by the respondents of art. 8(1) of the Federal Constitution (para. 40 of the statement of claim);

(iv) dishonesty and conspiracy (para. 36 of the statement of claim);

(v) that the respondents acted *ultra vires* the Act (para. 41 of the statement of claim);

(vi) that the respondents acted unreasonably (para. 44 of the statement of claim); and

(vii) that the second respondent has trespassed on the seven plots of land since 8 October 2012 (para. 45 of the statement of claim).

All these causes of action the appellant submitted, were valid and sustainable. Therefore this suit is clearly not a plain and obvious case to be struck out in a summary manner, principally because findings of fact have to be made by a trial judge after witnesses are cross-examined. Further, there has to be extensive discovery of documents pursuant to O. 24 of the Rules of Court 2012. All these procedural steps can only occur in a civil suit, and not under a judicial review application under O. 53 of the Rules of Court 2012.

[16] The High Court therefore had erred in fact and in law in failing to appreciate that, upon review of the statement of claim in its entirety, and the contemporaneous documents:

(i) there were sustainable causes of action as against the respondents; and

(ii) it was not "plain and obvious" that the appellant's claim was doomed to fail, and therefore, should not have been struck out summarily.

In any event affidavits were filed in the striking out applications (four by the appellant and eight by the first and second respondents), with numerous exhibits thereto. The need for trial and *viva voce* evidence could not be emphasised more.

[17] Finally the validity of land acquisitions could be challenged by way of filing a civil suit which was the action before us. Learned counsel submitted that the law was clear, and supported the appellant's claim in the civil suit. Therefore, the appellant's case against the respondents could not be struck out, but should proceed to trial.

[18] We pause here to observe, that it is not disputed that the appellant participated in the land enquiry held on 3 September 2012 and thereafter initiated the seven land references that are still pending at present. By doing

so, in our considered view, it is perfectly safe to infer from the appellant's conduct, that it has taken the position that the acquisition of the seven plots of land is valid. By filing the land references, the appellant, must be taken to have also acknowledged that their remedy lies only in the form of monetary compensation. The total compensation awarded to the appellant at the land enquiry for the acquisition of the seven plots of land was RM114,964,890. The affidavit in reply of the first respondent, affirmed by A Rahim bin Nin on 19 October 2014 in this regard, revealed that this sum was paid and banked into a bank account for the benefit of the appellant.

[19] We could not however otherwise apprehend, that given the above factual scenario, the appellant commenced the present action more than one and a half years after the appellant received the above mentioned sum and initiated the land references. It is abundantly clear that the civil suit is premised on the basis that the acquisitions of the seven plots of land are purportedly invalid and the appellant should be allowed to recover the seven plots of land and claim damages for trespass. It ought to be highlighted that as at the date of the hearing of the application to strike out, the appellant had failed to refund or make any attempt to refund the said compensation sum of RM114,964,890 or any portion thereof. This is very clearly stated in para. 6 of the first respondent's affidavit in reply affirmed on 19 October 2014.

[20] The appellant's conduct as described hereinbefore is plainly inconsistent and contradictory. The alleged rights pursued and relief sought through the present action are remarkably inconsistent with and contradict the right pursued and relief sought in the land references. Despite being fully aware of all relevant facts and matters, the appellant has elected and continued to elect seeking relief by means of the land references which remain current. Despite having been paid and enjoying the RM114,964,890 compensation for the seven plots of land, the appellant now also wishes to recover the seven plots of land. Obviously, after the appellant had obtained some advantage, to which they could only be entitled on the footing that it was valid, they now turned around and said that the acquisition of the seven plots of land was void for the purpose of securing some other advantage. The appellant's conduct, as it were, could thus be properly described as blowing hot and cold that while the appellant approved the acquisitions they also rejected it. The appellant is not permitted to approbate and reprobate on the issue of the acquisition of the seven plots of land.

[21] Reference in this connection may be made to the case of *Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal* [2011] 8 CLJ 766; [2011] 6 MLJ 297. In that case, the Federal Court cited with approval, the English Court of Appeal's decision in *Verschures Creameries, Limited v. Hull And Netherlands Steamship Company, Limited* [1921] 2 KB 608 wherein Scrutton LJ held:

A plaintiff is not permitted to "approbate and reprobate." The phrase is apparently borrowed from the Scotch law, where it is used to express the principle embodied in our doctrine of election - namely, that no party can accept and reject the same instrument: *Ker v. Wauchope* (1); *Douglas-Menzies v. Umphelby* (2). The doctrine of election is not however confined to instruments. *A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction*. (emphasis added)

[22] Further, in *Cheah Theam Kheng v. City Centre Sdn Bhd (In Liquidation) & Other Appeals* [2012] 2 CLJ 16; [2012] 1 MLJ 761, this court cited with approval the English case of *Express Newspapers plc v. News (UK) Ltd And Others* [1990] 3 AII ER 376 wherein it was stated:

In the words of Sir Nicolas Browne-Wilkinson VC in *Express Newspapers plc v. News (UK) Ltd and others* [1990] 3 AII ER 376, at pp 383-384:

> There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, **having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance**. (emphasis added)

[23] The decision of this court in *Tenaga Nasional Bhd v. Irham Niaga Sdn Bhd & Anor* [2011] 1 CLJ 491; [2011] 1 MLJ 752 is also instructive. We reproduce the relevant excerpts below:

Estoppel by election is related to the principle that a person may not approbate and reprobate (*Lissenden v. CAV Bosch, Limited* [1940] AC 412 p 478; [1940] 1 All ER 425 at p 418 at p 429 (HL)). Thus, a person having a choice between two courses of conduct is to be treated as having made an election from which he cannot resile. But the person will not be regarded as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent with his election (*Banque des Marchands de Moscou (Koupetschesky) v. Kindersley and another* [1951] Ch 112 at pp 119-120; [1950] 2 All ER 549 at p 552 (CA); *Ex parte Robertson, In re Morton* (1875) LR 20 Eq 733; and *Evans v. Bartlam*) ...

If a person is entitled to one of two inconsistent rights, as opposed to having a choice between two alternative remedies (*United Australia, Limited v. Barclays Bank, Limited* [1941] AC 1 at p 29; [1940] 4 All ER 20 at p 37 (HL)) and, with an open mind and with full knowledge he does an unequivocal act showing that he has chosen one, he cannot afterwards pursue the other (*Slough Estates Ltd v. Slough Borough Council and another (No 2)* [1969] 2 Ch 305; [1969] 2 All ER 988 (CA)).

[24] We now turn to the next relevant point. The seven plots of land were acquired by the first respondent and not by the second respondent, in accordance with s. 3(1)(b) of the Act. In law, upon the said acquisition, the seven plots of land thereupon became vested in the State Authority as State land, and not in the second respondent, in accordance with ss. 23 and 66 of the Act. The first respondent's affidavit in support deposed by A Rahim bin Nin on 9 June 2014 quite clearly shows that the seven plots of land are at present State land and have not been alienated to or vested in the second respondent. It is manifest from the appellant's claims and prayers in the present action that they seek the recovery of ownership and possession of the seven plots of land. Since the seven plots of land are at present State land, the appellant therefore seeks recovery of the seven plots of land from the State Government which is the first respondent. However, such relief is expressly prohibited by s. 29(1)(b) of the Government Proceedings Act 1956 (Act 359) which expressly provides that:

> Nature of relief
>
> 29.(1) In any civil proceedings by or against the Government the court shall, subject to this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:
>
> Provided that:
>
> ... (b) **in any proceedings against the Government for the recovery of land or other property the court shall not make an order for the recovery of the land** or the delivery of the property, but may *in lieu* thereof make an order declaring that the plaintiff is entitled as against the Government to the land or property or to the possession thereof. (emphasis added)

[25] The Federal Court in *Pemungut Hasil Tanah, Daerah Barat Daya (Balik Pulau) Pulau Pinang v. Kam Gin Paik & Ors* [1983] 1 LNS 37; [1983] 2 MLJ 390 held that the above provisions prohibited the relief of recovery of land being made against the Government. At p. 395 of the report, the Federal Court succinctly said:

> Having regard to the express provision of section 29(1)(b) of the Government Proceedings Ordinance, 1956 can the court at all make an order of repossession of the lands against the Government? ... Section 29(1)(a) was also examined in *Ramamoorthy v. Menteri Besar Selangor & Anor* [1971] 1 MLJ 187 and Gill F.J. as then was, said that the provisions of section 29 are *"sufficiently clear so as to leave no room for argument." ... the special position of the Government is nevertheless maintained and the power of the court to grant relief against the Government is expressly restricted*. In the preliminary note of *Halsbury's Statute* Vol. 6 the following note explains the position of the Crown in all civil proceedings as provided by section 21 of the Crown Proceedings Act, 1947 of the United Kingdom which is in *pari materia* with section 29 of our Government Proceedings Ordinance, 1956:

> No relief by way of injunction or order of specific performance may be given against the Crown or an officer of the Crown if the effect would be to bind the Crown, but instead an order declaratory of the rights of the parties must be made. No order may be made against the Crown for the recovery of land or the delivery of property, but instead any order must declare that as against the Crown the plaintiff is entitled to the land or property. (emphasis added)

[26] The Privy Council, on appeal, upheld the above decision of the Federal Court (see *Pemungut Hasil Tanah, Daerah Baarat Daya, Penang v. Kam Gin Paik* [1986] 1 CLJ 283; [1986] CLJ (Rep) 33; [1986] 1 MLJ 362] in particular, the Privy Council held as follows:

> (The Federal Court) also held that, having regard to section 29(1)(b) of the Government Proceedings Ordinance, 1956, the trial judge had no power to make an order against the appellant for delivery up of possession of the respondents' lands, and accordingly set aside that part of his order. In other respects the Federal Court dismissed the appeal. ... *their Lordships agree with the Federal Court that section 29(1)(b) of the Government Proceedings Ordinance, 1956 precludes an order being made against the Government, whose servant the appellant is, for the recovery of the land.* So the Federal Court rightly set aside that part of the order of the learned trial judge which ordered the appellant to deliver possession of the lands back to the respondents. (emphasis added)

Additionally and intertwined in their claim for the recovery of the seven plots of land is prayer (2) of the statement of claim by virtue of which the appellant seeks a specific relief which is, in substance, a form of mandatory injunction against the first respondent. Such relief is, in our opinion, in breach of the prohibition contained in s. 29(1)(a) of Act 359 which expressly precludes the court from granting an injunction or making an order for specific performance against the first respondent but may *in lieu* thereof make an order declaratory of the rights of the appellant.

[27] It is beyond question that the aforesaid provisions prohibit the appellant's claim herein for recovery of land and their claim for what in substance is a mandatory injunction against the first respondent. Particularly relevant in this regard is s. 2 of Act 359 which makes clear that "Government" "includes the Federal Government and the Governments of the States". Accordingly, the status of the seven plots of land as being at all material times the State land cannot in the circumstances be reversed. On that basis, there is certainly force in the contention that there can be no question of the appellant maintaining a claim for trespass against the second respondent as such a claim is derivative of the relief sought against the first respondent. Also, there can be no question of trespass if the seven plots of land continue to remain as State land. It follows therefore that the relief of damages sought by the appellant for the second respondent's alleged trespass cannot be maintained and flowing from this, prayers (4) and (5) of the statement of claim are plainly and obviously unsustainable.

[28] We shall next turn to consider the declaration sought by the appellant in prayer (1) of their statement of claim which is that the purported acquisition of the seven plots of land was illegal and of no effect. The purpose of the declaration is, quite obviously, to supply a basis for the appellant's claim for the recovery of their seven plots of land and the consequent prayers for damages for trespass. However, the appellant's prayer (1) is patently an affront against s. 29(1)(b) of Act 359. In such circumstances prayer (1) is, in our finding, obviously not maintainable either. In any event, even if a declaration in appropriate terms is to be considered in this case, the seven plots of land would continue to remain as state land. The only remedy available to the appellant would be that of monetary compensation reflective of the appropriate market value of the seven plots of land. This being the case, the forum for claiming such monetary compensation is the land references. Any claim for monetary compensation for the seven plots of land in this suit would therefore duplicate the claim within the land references. Apart from being an abuse of court process and scandalous, a prayer for declaration whether as presently sought or modified is, frivolous and vexatious due to the appellant's pending land references.

[29] Learned counsel for the appellant had submitted that the present suit was filed in the High Court purportedly on the basis of certain documents received and facts discovered by them on 2 January 2014. In its claims, the appellant challenged the exercise of the first respondent's jurisdiction, functions, rights and powers in relation to the compulsory acquisition of the seven plots of land, and accordingly they contended that the acquisition was a nullity. The appellant's complaints are therefore based on the alleged infringement of their rights in public law, and not private law. However, the appropriate mode for pursuing complaints based on the alleged infringement of public law rights is judicial review, a mode governed by O. 53 of the Rules of Court 2012. But, the appellant is without doubt, out of time to do so and had indeed already been out of time when it filed the present action. Order 53 r. 3(6) in this connection, clearly prescribes a requirement to act promptly and in any event within three months from the date when the grounds of complaint first arose or when the decision is first communicated to the appellant.

[30] Before proceeding further, we wish to deal briefly with the difference between public law and private law rights. Public law, we apprehend, governs relationships between Governments or public authorities and subjects, where the authority concerned has power in matters that affect the rights of subjects such as the matter before us that is land acquisition. Additionally, public law also governs relationships that are of direct concern to society such as criminal law. In short, public law powers cannot be

A exercised by any private individual or entity. Private law on the other hand, deals with the relationships between private individuals or entities with which the State is not directly concerned, as in the relations between husband and wife, the law of contract and law of torts. Governments and public authorities too can be subjected to private law as in cases where the
B government contracts with a private individual or a corporation to enter into a transaction. Private law is the counterpart to public law.

[31] In *Ringgit Exoticka Sdn Bhd v. Pengarah Tanah & Galian Selangor & Ors* [2013] 10 CLJ 663; [2014] 8 MLJ 111, the High Court had this to say regarding the distinction between public and private law proceedings:

C

> In private law proceedings, it is the parties alone who are directly concerned with the outcome of the litigation. The public at large are not usually interested in the outcome ... In contrast, public law proceedings usually affect many members of the public at large as well as parties to the proceedings (e.g. decisions of public bodies concerning orang asli
D native land rights, environment issues ...) ... However, there are also public law proceedings which do not usually affect members of the public. A common example of this involves a person's application to quash the decision of the Industrial Court dismissing his claim for reinstatement on the ground of unlawful dismissal ... Both sets of proceedings are treated as public law proceedings because the decision is taken by a public body
E performing a public duty ... Judicial Review is therefore primarily concerned with enforcing public duties on behalf of the public as a whole.

Thus, in *Gouriet v. Union of Post Office Workers* [1978] AC 435, the House of Lords said:

> ... just as the Attorney-General has in general no power to interfere with
F the assertion of private rights, so in general no private person has the right of representing the public in the assertion of public rights.

The failure to bear the distinction between public and private law may lead to erroneous conclusions, as observed by the House of Lords in the following passage of *Gouriet* (*supra*):

G

> ... the jurisdiction of a civil court to grant remedies in private law is confined to the grant of remedies to litigants whose rights in private law have been infringed or are threatened with infringement. To extend that jurisdiction to the grant of remedies for unlawful conduct which does not infringe any rights of the plaintiff in private law, is to move out of the field
H of private law into that of public law with which analogies may be deceptive and where different principles apply ...

[32] Proceeding from the above, the test on whether an act, omission, conduct or decision ought to be the subject matter of a judicial review as opposed to private law proceedings is based primarily on the source from
I which the act, omission, conduct or decision emanates. The Supreme Court in *Ganda Oil Industries Sdn Bhd & Ors v. Kuala Lumpur Commodity Exchange*

& Anor [1988] 1 CLJ 126; [1988] 1 CLJ (Rep) 56; [1988] 1 MLJ 174 did in this regard cite with approval the English Court of Appeal's decision in *Regina v. Panel on Take-overs and Mergers, ex parte Datafin plc & Anor* [1987] 1 AII ER 564 wherein Lloyd LJ said:

> Of course the source of the power will often, perhaps usually, be decisive. If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review: see *R v. Disputes Committee of the National Joint Council for the Craft of Dental Technicians, ex p Neate* [1953] 1 AII ER 327; [1953] 1 QB 704].

It is beyond question that the jurisdiction and source of power to acquire the seven plots of land is statutory as the acquisition was pursuant to the Act, and arises in public law. Such jurisdiction and source of power cannot therefore be exercised by any private person or entity. The present suit, in our judgment, is not the proper mode to challenge the exercise of the first respondent's jurisdiction, functions, rights and powers in relation to the compulsory acquisition of the seven plots of land.

[33] We would emphasise that if the proper mode had been pursued by the appellant, compliance with the prescribed time period of three months for doing so is strict, fundamental and goes to jurisdiction. Order 53 r. 3(6) requires that:

> (6) An application for judicial review shall be made **promptly** and in any event **within three months** from the date when the grounds of application first arose or when the decision is first communicated to the applicant. (emphasis added)

This proposition has found favour with our courts in a plethora of local cases. Thus the Federal Court in *Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor* [2013] 4 CLJ 193; [2013] 4 MLJ 161 on this point said:

> ... Leave to appeal was granted by this court and the sole question framed for determination was:
>
> > Having regard to the decisions of the Supreme Court in *Mersing Omnibus Co Sdn Bhd v. Minister of Labour and Manpower* [1983] 2 MLJ 54, and *Ravindran v. Malaysian Examinations Council* [1984] 1 MLJ 168 and the Court of Appeal in *Tang Kwor Ham v. Pengurusan Danaharta Nasional* [2006] 1 CLJ 927 whether a court is required to consider the merits of an application for leave to commence judicial review made under Order 53 rule 3 of the Rules of the High Court 1980 when determining an application for an extension of time to file the said leave application?
>
> ... In conclusion, we are of the view that the time frame in applying for judicial review prescribed by the Rules is fundamental. It goes to jurisdiction and once the trial judge had rejected the explanation for the

A delay for extension of time to apply for judicial review, it follows that the court no longer has the jurisdiction to hear the application for leave for judicial review. Whether the application has merits or not, is irrelevant. (emphasis added)

[34] To illustrate further on the same point, in *Yahya Kassim v. Kerajaan* B *Malaysia & Anor* [1998] 1 CLJ 43; [1997] 3 MLJ 749, the Court of Appeal expressed the following opinion:

At this juncture, we wish to draw the attention of all concerned to Order 53 rule 1A of the Rules of the High Court 1980 ('the RHC'). Applications for *certiorari* must be made within six weeks of the decision which is C impugned. Leave is required before the substantive application is filed. **The failure to apply within the time limit is usually fatal**. (emphasis added)

This court in *Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd* [2010] 5 CLJ 123; [2010] 4 MLJ 360 went further as to state that compliance with the prescribed rules was fundamental as it went D to jurisdiction. It said:

The High Court in its judgment was of the view that the 40 days specified under Order 53 rule 3(6) was not rigid. I am of the view the judge erred in ruling that the time frame prescribed by the rules is not rigid. I am in agreement with the appellant's counsel that compliance with the time E frame prescribed by the rules is fundamental as it goes to jurisdiction (see *Mersing Omnibus Co Sdn Bhd v. Minister of Labour and Manpower & Anor* [1983] 2 MLJ 54).

[35] Furthermore, O. 53 r. 3(1) requires a party like the appellant to first obtain the leave of court before being permitted to challenge the acts F complained of by them:

(1) An application under this Order shall not be made unless leave therefor has been granted in accordance with this rule.

There is also a failure to adhere to other procedural provisions within O. 53 that are designed to ensure the filing of appropriate papers and a speedy G disposal of a potential judicial review, unlike in a writ action such as the appellant's.

[36] The applicability of O. 53 is further supported by the prayers in the appellant's statement of claim. Through its prayers, the appellant appears to seek, in substance, the relief against the respondents in the nature of H *mandamus* and *certiorari* as specified in para. 1 of the Schedule to the Courts of Judicature Act 1964 (Act 91) which reads as follows:

ADDITIONAL POWERS OF HIGH COURT

Prerogative writs

I 1. Power to issue to any person or authority directions, orders or writs, including writs of the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.

It would seem clear that the appellant also seeks the relief, as provided under para. 1 of the Schedule to Act 91, on the allegation that its rights under Part II of the Federal Constitution have been infringed. However, the procedure for seeking the relief specified under para. 1 of the Schedule to Act 91 is governed by O. 53 of the Rules of Court 2012, wherein r. 1(1) expressly provides that:

> Application for judicial review (O. 53, r. 1)
>
> 1. (1) This Order shall govern all applications seeking the relief specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 and for the purposes therein specified.

[37] Order 53 r. 2(2) and (3) further allows an applicant to include a prayer for declaration and clarifies the court's jurisdiction to grant monetary compensation. These provisions therefore lend further support to the conclusion that the proper and appropriate mode for ventilating the complaints contained in the statement of claim by pursuing challenges to the exercise of the first respondent's jurisdiction, functions, rights and powers in relation to the acquisition in question is through judicial review under O. 53 of the Rules of Court 2012 for which the appellant is irreparably out of time. This is pertinent here as the relief sought against the second respondent is a derivative of the relief sought against the first respondent.

[38] We find support for the above proposition on this critical point in the Federal Court's decision in the case of *Ahmad Jefri bin Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865; [2010] 3 MLJ 145 where the following question was before the Federal Court *viz*, "Whether pursuant to the amendment to O. 53 of the RHC *vide* Gazette notification PU(A) 342/2000 with effect from 22 September 2000, any application to challenge the decision of a public authority can only be commenced by way of a judicial review under O. 53 of the RHC." The current O. 53 is for all intents and purposes similar to the provisions considered by the Federal Court. It was held as follows:

> Aside from *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others described under the pre-amended Order 53 of the RHC, an alternative remedy for an aggrieved party seeking relief against a public authority on his infringed right to which he was entitled to protection under public law is for a declaration. ... *However, Order 53 of the RHC sets out a specific procedure for an aggrieved party seeking relief, including a declaration, against a public authority on his infringed right to which he was entitled to protection under public law to follow. It is our view that when such an explicit procedure is created to cater for this purpose, then as a general rule all such application for such relief must commence according to what is set down in Order 53 of the RHC otherwise it would be liable to be struck off for abusing the process of the court.* (emphasis added)

[39] The decision of the Federal Court in *Ahmad Jefri* (*supra*) relied upon the UK House of Lords' decision in *O'Reilly v. Mackman* [1982] 3 AII ER 1124 which held that it would be contrary to public policy and an abuse of the process of court for a person seeking to establish that a decision or action of a person or body infringes rights which are entitled to protection under public law, to proceed by way of an ordinary claim rather than judicial review procedure under O. 53, thereby evading the provision intended to protect public authorities. The position as discussed in *O'Reilly* was similar to the position in Malaysia after the amendment of O. 53 in 2000; and the current O. 53 is materially similar to the position after the amendment in 2000.

[40] In this connection, the case of *Lim Cheng Chuan Realty Co Sdn Bhd v. Kerajaan Negeri Pulau Pinang* [1999] 7 CLJ 499; [1999] 4 MLJ 669 is illustrative of one rationale behind this proposition where it was said:

> The court may extend the time if the delay is accounted for to the satisfaction of the court or judge' (*Mallal's Supreme Court Practice* (2nd Ed) para 53/1A/1). The court is still not ousted of its jurisdiction to quash illegal acts of the acquiring authority. But justice would not be achieved, rather eschewed, if action for a declaration could be brought to challenge the acquisition procedure, for that would mean that the acquiring authority, before it could use the land acquired, would have to sit out the statute of limitations. And that could not have been the intention of the Act. A challenge to the acquisition procedure must be made 'as soon as possible', and *certiorari* is the [only] proper procedure. (emphasis added)

[41] We are mindful that the Federal Court in *Ahmad Jefri* observed that a challenge on the use of appropriate procedure was fact based so that if the claim for infringement was based solely on substantive principles of public law then the appropriate process should be by way of O. 53. It further stated that if it is a mixture of public and private law then the court must ascertain which of the two was more predominant adding that if it had substantial public law element then the procedure under O. 53 must be adopted. Otherwise it may be set aside on ground that it abuses the court's process.

[42] As the matters stand, in *Leo Leslie Armstrong (Sebagai Presiden Dan Pemegang Jawatan The Young Men's Christian Association Of Kuala Lumpur) (Persatuan Pemuda Kristian Kuala Lumpur) v. Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur (Yang Dahulunya Di Pegang Oleh Majlis Mesyuarat Kerajaan Negeri Selangor)* [2015] 2 CLJ 10; [2015] 1 MLJ 255, the case cited before us by learned counsel for the appellant, where the appellant filed an originating summons *inter alia* to declare the conversion of the freehold tenure of the two lots to leasehold was *ultra vires* the National Land Code, and null and void and for the same to be reverted to freehold tenure, this court held that the dominant issue was the issue of private rights. Accordingly the appellant had the option of either proceedings under O. 53

of the Rules of the High Court 1980 or by ordinary action by way of originating summons. We think the appellant's point, well taken though it may seem, it ought however, to be emphasised that whether private law element is more predominant than the public law element in a particular case, would depend on the facts and circumstances of the case. The *Armstrong*'s case should not, in our opinion, be the authority to support the contention that in the present action, the appellant should have the option of either to proceed under O. 53 of the Rules of Court 2012 or otherwise to proceed by way of ordinary action, rather, at best, it serves as an example where private law element, by virtue of the circumstances of the case, is more predominant than the public law element.

[43] The *Armstrong*'s case therefore can be distinguished from the suit before us. In *Armstrong*, the matter arose from the appellant's application for subdivision of his freehold land and thus when the approval was given by the respondent with the change to a lesser status of the tenure which was from the grant in perpetuity to be substituted only with title of 99 years lease, surely it very much concerned the private rights of the appellant. Therefore private law element was more predominant. In the present case however, it involves the exercise of the first respondent's power to compulsorily acquire the seven plots of land from the appellant under the Act for which the appellant would be entitled to, and was in fact paid with, adequate compensation. The challenge by the appellant is clearly more on the exercise of the power conferred by law on the first respondent. It is indeed an exercise of the power by the public authority under public law which makes the public law element more apparent and predominant than the private law ingredient. Accordingly, the challenge to such exercise of the first respondent's power under the law should be mounted by way of a judicial review under O. 53 of the Rules of Court 2012.

[44] We would in addition emphasise that while the land references are pending before the High Court, the appellant commenced the present suit against the respondents seeking *inter alia* a declaration that the purported acquisition of the seven plots of land was illegal on the grounds of dishonesty, conspiracy and bad faith. In other words, the appellant in effect alleged that the respondents, in the whole process of the acquisition, including the exercise of the powers under the Act, acquired the seven plots of land illegally, with bad faith and in consequence of a conspiracy. The matter before the court certainly has a substantial public law element which requires the procedure under O. 53 of the Rules of Court 2012 to be adopted. The appellant, by commencing this action by way of a writ has clearly abused the court's process.

[45] We were pressed by learned counsel for the appellant with the argument that in this regard the principles of *Ahmad Jefri* were not applicable as the Court of Appeal's case of *Honan Plantations Sdn Bhd v. Kerajaan Negeri*

Johor & Anor [1998] 3 CLJ 253; [1998] 2 MLJ 498 was not considered and distinguished by the Federal Court. Learned counsel further submitted that *Ahmad Jefri* concerned a simple matter of the wrongful dismissal of a Government officer whereas in *Honan* it concerned a constitutional challenge of acquisition of land as the plaintiff relied on art. 13 of the Federal Constitution. Now that both cases have been referred in these appeals it behoves this court to now attempt to distinguish these two cases in order to assist us in coming to a correct decision. First of all, it does not seem to be realised by learned counsel for the appellant that nowhere did the Court of Appeal in *Honan* consider the issue of the constitutional challenge of the acquisition of land under art. 13 of the Federal Constitution. In fact, this court in *Honan* considered the issue whether the decision of the State Authority to acquire land could be challenged and whether the action disclosed no reasonable cause of action. The issue in *Ahmad Jefri* was whether an application to challenge the decision of a public authority could only be instituted by way of judicial review under O. 53 of the Rules of the High Court 1980 and whether a challenge of the decision of a public authority by way of writ and statement of claim, instead of an application for judicial review under the said O. 53 thereof, constituted an abuse of the process of court.

[46] In gist, the issue in *Ahmad Jefri* concerns the mode of challenging the decision of the public authority whereas in *Honan* the issue was whether the validity of the acquisition of land could be challenged in court. Clearly the issues in both cases are completely different. It is small wonder that *Honan* was not considered and distinguished by the Federal Court in *Ahmad Jefri*. Accordingly, we cannot accede to the argument urged for the appellant that the principle in *Ahmad Jefri* is not applicable to these appeals. The appellant no doubt is being deprived of his property but the seven plots of land was acquired in accordance with the law and with an award of adequate compensation subject of course to a determination by the High Court in the land references of any increase in such award.

[47] It has emerged that the appellant themselves had admitted in paras. 35, 36 and 39 to 46 of the statement of claim that the present suit was filed purportedly on the basis of certain documents received and facts discovered by them on 2 January 2014. However, the irrefutable fact is that the writ herein was only filed on 9 May 2014. More than four months had therefore lapsed between the alleged discovery of the documents and the filing of the suit (which period shall for convenience be referred to as the "period of delay"). The first and second respondents had obviously suffered prejudice by reason of the said period of delay. As may be expected, the second respondent had, during the period of delay, incurred further costs and made additional investments. They had also entered into additional contractual

commitments for the purpose of continuing with and completing the RAPID project. The costs and commitments in question are substantial and large, and third parties' interests would be affected if these were stopped. This, we find, is not a disputed fact and there is contemporaneous, cogent and clear evidence of these commitments and costs. In fact, the Board of Directors of the second respondent had made the 'final investment decision' to proceed with the RAPID project during the period of delay.

[48] The above mentioned decision was announced by the second respondent in its media releases dated 3 April 2014 (exh. SMK A-1) wherein it was announced that the RAPID project was estimated to cost approximately USD16 billion while the associated facilities would involve an investment of about USD11 billion. In doing so, the second respondent had thereby forfeited, waived and foregone its contractual right to exit from the various contracts that it had entered in relation to the RAPID project. The said exhibit also evidences the magnitude of the RAPID project and the costs, investments and contractual commitments that could have been expected to be incurred, made and entered into by the second respondent during the appellant's period of delay. The appellant too, has alluded to the said "final investment decision" by the second respondent in para. 13 of the statement of claim. The first respondent moreover, had also acted in furtherance of the land acquisitions for the RAPID project during the appellant's period of delay, and it is after all, the first respondent's vast lands that had been cleared and worked on for the RAPID project and the relevant supporting infrastructure and related developments.

[49] Based on the facts gleaned from the affidavit of reply affirmed by Syed Mohd Kamal Al Habshi bin Syed A Rahman on behalf of the second respondent, we find that from the filing of the appellant's Form N dated 9 October 2012 to the date of the application to strike out the appellant's pleadings, there had been a total of 23 dates on which the land references (or an application within them) had been called up in the High Court and approximately the same number of court attendances involving the appellant and/or the Land Administrator and/or the second respondent. From the same affidavit, we can also discern the appellant's active resistance of the second respondent's applications to intervene in the land references and the appellant even brought the decision of the High Court to allow the intervention on appeal to the Court of Appeal. Additionally, from the time the appellant filed its originating summons on 2 May 2013 till the High Court struck it out on 8 September 2014, a total of 32 affidavits had been filed in the said originating summons by the appellant, the Land Administrator and the first respondent. There had also been a total of 30 dates on which the originating summons (or applications within it) had been called up in the High Court, and approximately the same number of court attendances

involving the appellant and/or Land Administrator and/or the second respondent. Specifically, during the period of delay, the appellant, the Land Administrator and the second respondent attended the High Court at Johor Bahru on six occasions for the originating summons and four occasions for the land references. In all of these occasions, the appellant had continued to maintain, and had not acted inconsistently with, their intention to challenge the compensation awarded to them.

[50] It was also contended for the first respondent that the appellant was attempting to improperly pressure both respondents into increasing the compensation payable to the appellant for the acquisition of the seven plots of land by way of settlement. It is clear to us that the first respondent had also asserted this fact in its affidavit in support affirmed by A Rahim bin Nin on 9 June 2014. It ought to be borne in mind that, the appellant is a corporation and as is with other similar corporations, it may be assumed that the appellant's primary, if not sole motivation, would be profitability by reference to monetary considerations, unlike probably an individual whose residence has been acquired. During the land enquiry relating to the seven plots of land, the appellant, amongst others, submitted that compensation ought to be calculated by reference to a purchase price stipulated in a document that was purported to be a written agreement between the appellant and one Meridian Strategies Sdn Bhd for the sale and purchase of one of the seven plots of land namely Lot 74 GRN 95049, the plot described as item 1 of para. 4 of the statement of claim. The facts that could be discerned from the first respondent's affidavit in support dated 9 June 2014 revealed that the said agreement between the appellant and Meridian Strategies Sdn Bhd had been entered into on 21 October 2011 that is after the publication of the s. 4 Gazette, and at the time when the appellant knew or ought to have known about the compulsory acquisitions of some or all of their seven plots of land. The purchase price stipulated in the said agreement between the appellant and Meridian Strategies Sdn Bhd was purported to amount to RM5.75 per square foot. This amounts to more than six times the rate of compensation awarded in the land enquiry for the six plots of land which was 93 sen per square foot.

[51] In this regard, it would be a pertinent point to mention that A Rahim bin Nin in his affidavit dated 9 June 2014 in support of the first respondent's application deposed that the said agreement between the appellant and Meridian Strategies Sdn Bhd was in any event uncompleted because the appellant failed to obtain the requisite approval from the Johor Estate Land Board to proceed with the sale. The first respondent had confirmed that, according to the Jabatan Penilaian Dan Harta, a sale which had not been completed could not be accepted as a comparable, a proposition which we would say is a correct position as it would be logical and acceptable that an

uncompleted sale should not amount to a comparable. The said proposition is also supported by para. 1A of the First Schedule of the LAA which provides that:

> (1A) In assessing the market value of any scheduled land, the valuer may use any suitable method of valuation to arrive at the market value provided that regard may be had to the prices **paid** for the recent sales of lands with similar characteristics as the scheduled land which are situated within the vicinity of the scheduled land and with particular consideration being given to the last transaction on the scheduled land within two years from the date with reference to which the scheduled land is to be assessed under subparagraph (1). (emphasis added)

[52] We would, in amplification of the above proposition, add that a sale and purchase agreement which is uncompleted is of no relevance. This principle finds support in the High Court's decision of *Dato' Yu Kuan Huat & Ors v. Pentadbir Tanah Wilayah Persekutuan KL* [2011] 1 LNS 1596 wherein it was stated and held as follows:

> The Sale and Purchase Agreement between the Intervener and the Applicants was dated, 5th December 2005, more than two (2) years prior to the date of the section 8 Gazette Notification on 15th May 2008. The purchase price per the Sale and Purchase Agreement dated, 5th December 2005 was RM83,476,890.00. The first 10% of the purchase price of RM83,476,890.00 representing RM8,347,689.00 was paid by the Intervener to the Applicants on 5th December 2005. The balance 90% of the purchase price of RM83,476,890.00 representing RM75,129,201.00 per the Sale and Purchase Agreement dated 5th December 2005 was to be paid by the Intervener to the Applicants within five (5) years from 5th December 2005, namely on or before 5th December 2010.
>
> The balance 90% of the purchase price of RM83,476.890.00 representing RM75,129,201.00 was only paid by the Intervener to the Applicants on 9th June 2011, six (6) months after the dateline, namely 5th December 2010 per the Sale and Purchase Agreement dated 5th December 2005, more than three (3) years after the date of the section 8 Gazette Notification on 15th May 2008. The purported sale of the said Land by the Applicants to the Intervener as at the date of the section 8 Gazette Notification on 15th May 2008 was not a transacted sale. The purported sale of the said Land by the Applicants to the Intervener as at 5th May 2006, two (2) years prior to the date of the section 8 Gazette Notification on 15th May 2008 was not a transacted sale, as at that time only 10% of the purchaser price or RM8,347,689.00 was paid by the Intervener to the Applicants. The purported sale of the said Land by the Applicants to the Intervener as at 9th June 2011, the date of the purported payment of the balance RM75,129,201.00 of the purchaser price was not a transacted sale. The purported sale of the said Land by the Applicants to the Intervener per the Sale and Purchase Agreement dated, 5th December 2005 does not comply with the requirements of paragraph 1 (1A) of the First Schedule of the Act for the purported sale price of RM83,476,890.00 to be adopted as a sale comparable ...

> We are minded to reject the purported sale of the said Land by the Applicants to the Intervener per the Sale and Purchase Agreement dated 5th December 2005 and we are minded to ignore the purported sale price of RM83,476,890.00 and consequently the sale price of RM83,476,890.00 will not be adopted as a sale comparable on the grounds that the purported sale does not comply with the provisions in paragraph 1 (1A) in the First Schedule of the Act in that it was not a transacted sale of the said Land within the stipulated time frame of two (2) years prior to the date of the section 8 Gazette Notification on 15th May 2008.

[53] The appellant had, during the period of delay, continued to affirm and file affidavits in their originating summons dated 2 May 2013 including an affidavit affirmed by one of its directors, one Kheoh And Yeng, on 9 January 2014 whereby the appellant indicated that it would disclose the documents allegedly received by them on 2 January 2014. The originating summons was thereafter called up in court on 28 January 2014 and adjourned pending a potential settlement. However, the second respondent did not subsequently proceed with any settlement discussion. The second respondent instead filed a further affidavit dated 6 February 2014 stating, *inter alia*, the belief that the appellant was attempting to improperly pressure the respondents into increasing the compensation payable for the acquisition of the seven plots of land by means of settlement. After the second respondent's said refusal to participate in settlement discussions, the appellant proceeded to disclose the documents purported to have been received by them on 2 January 2014 through an affidavit affirmed by the same deponent on 6 February 2014. Clearly, the conduct of the appellant was designed to improperly pressure the respondents into increasing the compensation payable to them for the acquisition of the seven plots of land by way of settlement. The same motive, in our judgment, continues to animate the appellant and motivated the filing of this suit.

Conclusion

[54] The well-established principle upon which the court acts in exercising its power to strike out pleadings under O. 18 r. 19(1) of the Rules of Court 2012 is that pleadings may only be struck out only and only if the court is satisfied that the claim is, on the face of it, obviously unsustainable. The burden to prove that the case is plainly and obviously unsustainable rests with the respondents. Thus, in the Supreme Court case of *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 it was held that:

> The principles upon which the Court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) Rules of the High Court 1980 are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule. This summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable.

[55] Many individuals have had their lands acquired for the RAPID project in respect of which the State Authority has, pursuant to s. 3(1)(b) of the Act, determined to be beneficial to the economic development of Malaysia and Johor as well as to the public in general. Substantial time, effort, cost and commitments have undoubtedly been expended and undertaken by the respondents in relation to the project. The appellant, however, now seeks to recover the seven plots of land which account to 45% of the RAPID project area. If the appellant succeeds, the RAPID project will necessarily fail. The relief which the appellant is seeking against the respondents would inevitably entail the undoing of the first appellant's acquisitions of the seven plots of land, render the said acquisitions void and prejudice the second respondent in view of its substantial commitment and huge costs incurred. Yet, it is fairly obvious that the appellant's primary motive is to obtain more compensation, which motive they continue to pursue in the land references. We need only say on this aspect that the resources committed to the RAPID project, effects on other landowners and anticipated benefits to society cannot be ignored and the attempt to cause the RAPID project to fail after a substantial lapse of time ought not to be entertained when the appellant ultimately only desires more compensation and does in fact have an opportunity to seek such increase in the compensation at the land references.

[56] Having considered the submissions by both learned counsel and all the materials placed before us, we are not persuaded that the learned judge had erred in law and on the facts when His Lordship struck out the appellant's writ of summons and counterclaim. In the premises, having regard to all the circumstances of the case and for the reasons discussed, we are driven inexorably to the conclusion that the appellant's action under consideration in this appeal is wholly unmeritorious and is plainly and obviously unsustainable as such should be dismissed. We unanimously affirm the order of the learned judge dated 26 November 2014 and accordingly dismiss these appeals with costs of RM25,000 for each appeal to be paid by the appellant to each respondent. The deposits shall be refunded to the appellant.